

INTERVIEW

## “The Inter-American System has always been in crisis, and we always found a way out”

An interview with Eduardo Ferrer Mac-Gregor Poisot

LUCAS SÁNCHEZ — RAFFAELA KUNZ — 17 October, 2016



Eduardo Ferrer Mac-Gregor Poisot is the Vice President of the Inter-American Court of Human Rights and one of the most progressive judges currently in office. This summer he spent some days at the Max Planck Institute for Comparative Public Law and International Law in Heidelberg for a conference on the implementation of judgments of the regional human rights courts. We had the opportunity to

meet him and discuss about new and old challenges to human rights adjudication on both sides of the Atlantic, including the financial problems the Inter-American system faces, and the recent backlashes against the European Court of Human Rights.

**You are here for a conference on the implementation of judgments of the Inter-American Court of Human Rights (IACtHR). It is well known that compliance has been a challenge in the Americas, a region still facing major human rights issues and with in many countries not yet stable rule of law structures and institutions. How would you evaluate the overall state of compliance with judgments of the IACtHR?**

To assess the impact of the IACtHR judgments we need to look at the big picture. In my opinion, the type of remedies the IACtHR has developed out of one provision of the Convention is one of its major contributions to human rights law and international law in general. The idea behind it is an integral reparation, or *restitutio in integrum*. One of the core characteristics of the Inter-American system, as opposed to its European counterpart, is that only a handful of cases in fact come before the Court. This has led the Court to develop reparations that go beyond the individual cases before it, in order to prevent that similar violations happen again in the future. This is why the Court historically has granted very broad remedies that go far beyond financial compensation. In this vein the Court has ordered remedies that range from public apologies, to building monuments, granting medical and psychological aid for victims, but also investigating grave human rights violations. One of the most important type of remedies ordered, the guarantees of non-repetition, aims at tackling structural problems, practices and laws that violate

the Convention. This type of changes requires time. That's why we cannot just look at the numbers. Out of the 200 judgments issued by the Court roughly 160 are still under supervision of compliance, but this is not the whole story. There is a high compliance rate regarding certain types of remedies. But obviously structural questions, especially those requiring constitutional amendments, cannot happen overnight. The types of remedies ordered have therefore a great influence on their compliance.

**Lately, there has been a lot of discussion about the financial crisis of the Inter-American system (see also [here](#) and [here](#); recently, the crisis has officially been declared to be overcome, the editors). What is the background of this crisis, and what consequences will it have on the human rights protection in the Americas?**

The strengthening of the financial situation is one of the major challenges for the Inter-American system. We speak about crisis now, but in fact the crisis started 38 years ago when the system came into being. It has always been in crisis. One of the big problems is that the judges at the Court are not full-time judges; all the judges also have additional occupational activities. For example, I am also a professor at UNAM (the National Autonomous University of Mexico, the editors). This affects the capacity of the Court. Therefore the next step should be that the member states undertake a greater commitment to convert the Court into a permanent court with full-time judges. Furthermore, the budget of the Court and the Commission together form less than 10% of the budget of the Organization of American States (OAS), while the European Court has a share of around 40% of the budget of the Council of Europe. This clearly shows the difference. The IACtHR has a regular budget of 2,7 million and

additionally 1,9 million of extraordinary means. This latter part consists of voluntary contributions by states, that sometimes are done and sometimes not. They stem from member states of the OAS, but also from the international cooperation with states like Norway, Denmark, Germany and Spain, and from institutional cooperation like for example with the Max Planck Institute (for Comparative Public Law and International Law, the editors). Because of the financial situation there has been this type of cooperation with institutions to benefit from human capacity building. Until today around 400 persons from 40 different countries travelled to Costa Rica to support the Court professionally. This is one way how the Court managed to move on with the few staff and means it has. Even though the Inter-American system has always been in crisis, it has always found a way out.

**What are in your view the other big challenges the Court faces?**

Another great challenge is the universality of the system. Only 20 of the 35 members of the OAS are subject to the jurisdiction of the Court. This is unacceptable; we need to keep on insisting that all the members subscribe to what is the heart of the system, namely the protection of human rights. If there is no understanding on this minimum standard, it is difficult to communicate, and we need to keep on working to ensure that we all speak the same language. Obviously there should be room for the particularities of each legal system, but we need to keep on trying to bridge the gaps, namely the ones that exist between common law and civil law. The majority of the common law countries – the US, Canada as well as many Caribbean States – have not ratified the American Convention. Finally, the last big

challenge of course is that we keep on working to improve the human rights situation. Still roughly 80% of the cases that come before the Court concern grave human rights violations – forced disappearance, torture, extralegal killings...But at the same time new issues arise, like for example sexual discrimination, questions concerning the freedom of expression, but also the protection of the environment. These are new challenges, which will also mark the future jurisprudence of the Court.

**As you know, also the ECtHR recently has come under pressure, some states, including the UK and Switzerland, even threaten to leave the system. What is your opinion on that?**

Well, I think that backlashes have many dimensions. Until now, denunciations have not occurred. In the Inter-American system, two states have left the system, namely Trinidad and Tobago in 1998 and Venezuela in 2012. Furthermore, some states have subscribed to the Convention, but not accepted the jurisdiction of the Court. We are still a purely Latin American Court: Only 20 of 35 states are under its jurisdiction, and 16 of these are Spanish speaking. There are thus big differences: In Europe, all the 47 members of the Council of Europe have accepted the jurisdiction of the ECtHR, and no state has left the system so far. Obviously, some cases provoke reactions, and there can be disagreement as to some interpretations. But I think that we should distinguish between interpretative disagreement and real denunciations. We have evolved from a constitutional state to a conventional state, and this is also a cultural issue that has to be assumed by all states in their commitments, which they accepted sovereignly. There will always be

disagreement, but we need to keep on pulling in the same direction, towards a better protection of human rights.

**But the rhetorics in some states clearly go beyond reactions to single cases and interpretations. Would you not speak of a crisis?**

Well, obviously, after the Brexit, there is an indirect indicator that the UK might indeed leave the system. But it has not yet happened, and in my view it would be a bit farfetched to speak of a real crisis. The ECtHR is still there, it is a powerful and well-functioning institution. It issues almost 1000 judgments per year!

**Do you think that the contestation of some domestic courts in certain cases might in the end strengthen the system and lead to a real dialogue between courts?**

The solution to the existing problems is always dialogue. Not in the sense of negotiation, but in order to help understanding that we are all involved in one common project, which is the effective and real protection of human rights. The international human rights courts are based on the principle of subsidiarity; they do not replace the domestic courts, but just complement them in order to achieve a better protection. In the Inter-American system, since 2006, through the doctrine of the conventionality control (*control de convencionalidad*) this dialogue is institutionalized. This is a major change, the domestic judges now must apply not only the Convention but also the jurisprudence of the IACtHR. This has also lead to an intensification of the dialogue; we observe that today especially constitutional courts cite the Convention and the jurisprudence of the Court much more often. We are all

speaking the same language now, and dialogue is at the core of the Inter-American dynamics.

**And does the IACtHR also take into account the perspective of national courts?**

This dialogue works in both directions. Today more than ever the IACtHR uses the jurisprudence of domestic courts to solve the cases before it. During the era of the dictatorships obviously it was a one-way-street. Since the 90ies, there has been a wave of new constitutions or constitutional reforms that introduce the international human rights law in the domestic constitutional orders. The Spanish Constitution of 1978 was a key moment with its Art. 10.2, which requires a consistent interpretation of the constitution with international human rights treaties. Similar provisions have been adapted in many states in the Americas, and progressively this builds the basis for and strengthens a democratic order based on the rule of law in Latin America. The establishment of new constitutional courts really marks the beginning of a new era, an era of dialogue, because these courts started to contribute to the interpretation of the Convention rights.

**But on the other hand, the Mexican Supreme Court received the UN Human Rights Prize for its open and human rights friendly jurisprudence whilst at the same time the human rights situation in Mexico is dominated by grave violations.**

Well, this is the big Latin American problem, the constitutional poetry. We have constitutions that anyone would consider as being progressive, even containing social rights in their fullest splendor. But between aspirations and reality remains a big gap. This has to do with weak

institutions, corruption, impunity, monopolies...This is the core of the problem that we have to overcome, by strengthening the rule of law institutions in order to work towards a more constitutional state of affairs. Unfortunately on the American Continent grave human rights violations are still very dominant, even though they are not anymore related to the dictatorships that characterized its past. What is predominant nowadays is the organized crime, which created a new form of violence. It is not so much the state anymore that commits human rights violations for political reasons, but organized groups of all types, sometimes with active state support, sometimes with the acquiescence of government authorities. Even though the background is different and we now live in constitutional and democratic states, the types of violations remain similar. The organized crime poses huge problems in the Latin America of today.

**To conclude, what do you think that the two systems can learn from each other?**

Even though the contexts in which the two courts operate are very different, their goal is and remains the same. Obviously the IACtHR grew up looking across to its European counterpart, and in its first years of existence its jurisprudence was clearly influenced by the ECtHR. This then changed as the IACtHR started to develop its very own and rich jurisprudence, especially in order to deal with the grave human rights violations it faced. Despite the differences the common points clearly dominate and the two bodies have a lot to learn from each other, through a genuine judicial dialogue.



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